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8 **UNITED STATE DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**

11 ARISHA BYARS, individually and on
behalf of all others similarly situated,

12 Plaintiff,

13 v.

14 SEPHORA USA, INC., a Delaware
corporation d/b/a
15 WWW.SEPHORA.COM,

16 Defendant.

Case No. 5:23-cv-00883-SSS-KK

17 **MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S RESPONSE IN
OPPOSITION TO DEFENDANT'S
MOTION TO TRANSFER VENUE
TO THE EASTERN DISTRICT OF
CALIFORNIA**

18 [Declarations of Arisha Byars and Scott
J. Ferrell; Request for Judicial Notice
filed concurrently herewith; [Proposed]
Order lodged concurrently herewith]

19 Date: September 29, 2023
20 Time: 2:00 p.m.
Courtroom: 2
Judge: Hon. Sunshine S. Sykes

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6	First Amended Class Action Complaint for Violation of the California Invasion of Privacy Act ("CIPA") filed on April 4, 2023 (and subsequently deemed filed as of April 24, 2023), in <i>Martin v. Sephora USA, Inc.</i> , No. 1:22-cv-01355-JLT-SAB, Doc. 22 (E.D. Cal. Apr. 4, 2023)	1
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13	https://www.census.gov/quickfacts/fact/table/CA (last visited Sept. 4, 2023) (table estimating the population of California state as of July 1, 2022 obtained from the website of the U.S. Census Bureau)	18
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22	Memorandum of Points and Authorities in Support of Plaintiff's Response in Opposition to Defendant's Motion to Dismiss Plaintiff's Class Action Complaint filed on February 7, 2023, in <i>Martin v. Sephora USA, Inc.</i> , No. 1:22-cv-01355-JLT-SAB, Doc. 14 (E.D. Cal. Feb. 7, 2023)	1
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant’s Motion is premised on an entirely false narrative – one that Defendant’s counsel knows to be untrue. As shown below, the Motion should be denied, and Defendant’s counsel should be reminded of their duty of candor to this Court.

II. PROCEDURAL HISTORY

7 On October 23, 2022, Ruth Martin (“Martin”) commenced a putative class action
8 in the Eastern District of California (“Eastern District”) in *Martin v. Sephora USA, Inc.*,
9 No. 1:22-cv-01355-JLT-SAB (E.D. Cal. voluntarily dismissed May 16, 2023) (“Martin”)
10 against Defendant Sephora USA, Inc. (“Defendant”) alleging two claims for relief under
11 sections 631(a) and 632.7 of the California Penal Code. Although *Martin* was pled as a
12 putative class action, no class was ever certified as reflected in the docket. (RJN Ex. 9.)

13 On January 24, 2023, Defendant filed a Motion to Dismiss in the *Martin* action
14 alleging in part a consent defense. (RJN Ex. 1 at 9:27-11:27.)

15 On February 7, 2023, Martin filed an opposition to such Motion to Dismiss in the
16 *Martin* action. (RJN Ex. 2.)

17 On February 17, 2023, the “matter” in *Martin* was referred to Magistrate Judge
18 Stanley A. Boone to issue findings and recommendations. (RJN Ex. 9.)

19 On March 30, 2023, Magistrate Judge Boone filed Findings and Recommendations
20 Recommending Granting in Part Motion to Dismiss in *Martin* including the
21 recommendation that leave to amend be granted as to the first cause of action only, *i.e.*,
22 section 631(a) of the Penal Code. (RJN Ex. 3.)

23 On April 24, 2023, the *Martin* court issued an Order Adopting Findings and
24 Recommendations in full. (RJN Ex. 5.) As such, Martin’s previously-filed First
25 Amended Complaint (“FAC”) was deemed to be filed as of that date, and Defendant had
26 21 days to file a responsive pleading. (RJN Exs. 4-5.)

27 On May 13, 2023, Defendant's counsel, attempting to meet and confer before
28 moving to dismiss the FAC in *Martin*, claimed via email that Defendant had disclosed a

1 warning notice on its Website's chat feature as of June 6, 2022. (Ferrell Decl. ¶ 10.)
2 Plaintiff's investigation determined that such contention was false, (*id.* ¶¶ 2, 20 & Exs. 1,
3 3), but it raised the distinct possibility that Defendant might have a unique defense against
4 Martin's action based on consent, and that Plaintiff's action would be much stronger
5 because of the earlier timing of Plaintiff's visit, (*id.* ¶¶ 16-19).

6 On May 15, 2023, Defendant filed a Motion to Dismiss Plaintiff's FAC in *Martin*,
7 ***which conspicuously omitted the previously-threatened consent defense.*** (RJN Ex. 6.)

8 On May 16, 2023, at 2:51 p.m. PDT, Martin filed "Plaintiff's Notice of Dismissal
9 Without Prejudice Pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i)" in *Martin*,
10 which stated:

11 "Pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i), Plaintiff Ruth
12 Martin dismisses without prejudice this action against Sephora USA, Inc.
13 Defendant has not yet filed or served an answer to Plaintiff's Complaint, nor filed
14 a motion for summary judgment."

15 (RJN Ex. 7 at 2:1-4; Ferrell Decl. ¶ 21.) Thus, as of 2:51 p.m. on May 16, 2023, *Martin*
16 ceased to exist as a pending action.

17 On that same date, at 3:13 p.m. PDT, Plaintiff commenced the instant action
18 against Defendant alleging two claims for relief under sections 631(a) and 632.7 of the
19 Penal Code.¹ (Doc. 1; Ferrell Decl. ¶ 22.) Thus, as of the time that Plaintiff commenced
20 the instant action, *Martin* was no longer pending regardless of whether or not the court
21 therein administratively "closed" the case or not. *Commercial Space Mngt. Co., Inc. v. Boeing Co., Inc.*, 193 F.3d 1074, 1078 (9th Cir. 1999).

22 On May 16, 2023, Plaintiff filed a Notice of Related Cases in the instant action
23 pursuant to L.R. 83-1.3.1. Plaintiff stated that the instant action "is related to two
24

25
26 ¹ Defendant's contention that Plaintiff is alleging the exact same claim under § 631(a)
27 that had been dismissed with prejudice by the *Martin* court, (Def.'s Mem. at 8:13-14), is
28 mistaken. Although the *Martin* court dismissed with prejudice Martin's claim in the
original complaint under § 631(a) for ***direct party liability*** under the first, second, and
third clauses of § 631(a), the Complaint in the instant action is pursuing a § 631(a) claim
solely under a ***derivative liability*** theory under the fourth clause of § 631(a).

1 previously-filed and pending actions": (1) *Arisha Byars v. Macy's Inc.*, No. 5:23-cv-
2 00456-SSS-KK; and (2) *Arisha Byars v. Goodyear Tire & Rubber Co.*, No. 5:22-cv-
3 01358-SSS-KK. (Doc. 5.)

4 On May 17, 2023, the *Martin* court issued an order directing the Clerk of Court to
5 close that case, which quoted the Ninth Circuit's decision in *Commercial Space Mngt.*
6 *Co.*, 193 F.3d at 1078, as follows:

7 **"[A] dismissal under Rule 41(a)(1) is effective on filing, no court order is
8 required,** the parties are left as though no action had been brought, the defendant
9 can't complain, and the district court lacks jurisdiction to do anything about it."

10 (RJN Ex. 8 at 1:26-28) (emphasis added).

11 On May 17, 2023, the instant action was assigned to the Honorable Jesus G. Bernal.
12 (Doc. 6.)

13 On May 19, 2023, the Court issued an order consenting to the transfer of the instant
14 action to this Court based upon multiple reasons. (Doc. 10.)

15 On June 28, 2023, Plaintiff sent a Notice of Lawsuit and Request for Waiver of
16 Service Summons to Defendant, which Defendant signed on July 17, 2023, (Ferrell Decl.
17 ¶ 24 & Ex. 5), which allowed Defendant to file a timely responsive pleading by August
18 28, 2023.

19 On August 25, 2023, Defendant filed the instant Motion, (Doc. 13), and a Motion
20 to Dismiss, (Doc. 15).

21 III. ARGUMENT

22 A. Applicable Legal Standard

23 "For the convenience of parties and witnesses, in the interest of justice, a district
24 court may transfer any civil action to any other district or division where it might have
25 been brought." 28 U.S.C. § 1404(a). "Under § 1404(a), the district court has discretion
26 'to adjudicate motions for transfer according to an 'individualized, case-by-case
27 consideration of convenience and fairness.'" *Jones v. GNC Franchising, Inc.*, 211 F.3d
28 495, 498 (9th Cir. 2000). "In deciding a motion to transfer venue, the court typically

1 weighs a number of public and private factors, including (1) plaintiff's choice of forum;
2 (2) the convenience of the parties; (3) the convenience of the witnesses; (4) the location
3 of books and records; (5) which forum's law applies; (6) the interests of justice; and (7)
4 administrative considerations." *Rubio v. Monsanto Co.*, 181 F. Supp. 3d 746, 759 (C.D.
5 Cal. 2016).

6 "The defendant must make a **strong** showing of inconvenience to warrant upsetting
7 the plaintiff's choice of forum." *Decker Coal Co. v. Commonwealth Edison Co.*, 805
8 F.2d 834, 843 (9th Cir. 1986) (emphasis added). Transfer must do more than merely
9 "shift the inconvenience from one party to another." *Safarian v. Maserati N. Am., Inc.*,
10 559 F. Supp. 2d 1068, 1071 (C.D. Cal. 2008) (citing *Van Dusen v. Barrack*, 376 U.S.
11 612, 645-46 (1964) ("Section 1404(a) provides for transfer to a more convenient forum,
12 not to a forum likely to prove equally convenient or inconvenient.")); *Decker Coal Co.*,
13 805 F.2d at 843 (affirming denial of defendant's motion to transfer) ("The transfer would
14 merely shift rather than eliminate the inconvenience.").

15 "The party seeking to transfer venue bears the burden of showing that convenience
16 and justice require transfer." *Lodestar Anstalt v. Bacardi & Co. Ltd.*, 2017 WL 1434265,
17 at *2 (C.D. Cal. Apr. 21, 2017). "The decision to transfer lies within the sound discretion
18 of the trial judge." *Lodestar*, 2017 WL 1434265, at *2.

19 **B. Plaintiff Could Not Have Brought Her Action in the Eastern District.**

20 "[T]he defendant must establish that the matter 'might have been brought' in the
21 district to which transfer is sought." *Metz v. U.S. Life Ins. Co. in City of New York*, 674
22 F. Supp. 2d 1141, 1145 (C.D. Cal. 2009). "This includes demonstrating that ... venue
23 would have been proper **if the plaintiff had filed the action in the district to which**
24 **transfer is sought.**" *Id.* at 1145 (emphasis added and citations omitted). This begs the
25 question whether venue would have been proper if Plaintiff had filed the instant action in
26 the Eastern District. The answer is that Defendant has miserably failed to satisfy its
27 burden of proof on this precise issue.

28 **1. Defendant Has Failed to Demonstrate that a Substantial Part of the**

Acts and Events Giving Rise to Plaintiff's Claims Occurred in the Eastern District.

3 Although Defendant contends that “a ‘substantial part of the acts and events giving
4 rise to the claims occurred in [the Eastern District of California],’” (Def.’s Mem. at 5:19-
5 20), the *Martin* action does not count as a case in which *Plaintiff* was a *party* because a
6 class was never certified in that action. *Smith v. Bayer Corp.*, 564 U.S. 299, 315 (2011)
7 (“Neither a proposed class action nor a rejected class action may bind nonparties.”); *id.*
8 at 318 (“the mere proposal of a class in the federal action could not bind persons who
9 were not parties there”). Defendant’s failure to address *Smith*, which is binding
10 precedent, is inexcusable.

11 Defendant ignores addressing the question how it would have been appropriate for
12 **Plaintiff** to establish venue in the Eastern District given that Plaintiff has expressly
13 alleged that “a substantial part of the acts and events giving rise to the claims occurred in
14 this District.” (Compl. ¶ 2.) Indeed, Plaintiff was located in the Central District of
15 California (“Central District”) at all relevant times pertaining to the allegations in the
16 Complaint. (Byars Decl. ¶ 3.) As such, it would have been improper for Plaintiff to
17 attempt to establish venue in the Eastern District given that she could not have satisfied
18 the venue requirements of 28 U.S.C. 1391(b)(2) had she filed suit instead in the Eastern
19 District.

20 The mere fact that the Complaint is pled as a putative class action is irrelevant
21 under 28 U.S.C. § 1331(b)(2). *Johnson v. Law*, 19 F. Supp. 3d 1004, 1009 (S.D. Cal.
22 2014) (“determination of proper venue is generally based on the named plaintiff, not
23 unnamed or absent putative class members”) (citing case); *id.* at 1010 (“the claims of
24 possible other class members are irrelevant to the venue determination [under §
25 1331(b)(2)]”).

26 Defendant's reliance upon *LegalForce, Inc. v. Legalzoom.com, Inc.*, 2018 WL
27 6179319 (C.D. Cal. Nov. 27, 2018), is misplaced because both parties therein asserted
28 that "a substantial part of the events giving rise to this claim occurred" in the transferee

1 district. *Id.* at *2. In contrast, Plaintiff, here, has not asserted that a substantial part of
2 the events giving rise to *her* claim occurred in the Eastern District.

3 In addition, the plaintiff entity in *LegalForce* “actually did bring” its action in the
4 Northern District of California (“Northern District”) before it voluntarily dismissed its
5 operative pleading, and subsequently filed a complaint in the Central District. *Id.* at *1-
6 *2. Here, in contrast, Plaintiff did not bring any action in the Eastern District.

7 **2. Defendant Has Failed to Demonstrate that It Was a Resident of the
8 Eastern District If It Was a Separate State.**

9 Although Defendant contends that it is “subject to personal jurisdiction in the
10 Eastern District” “because” its “principal place of business is in California,” (Def.’s Mem.
11 at 5:17-18), that contention is irrelevant for purposes of the relevant venue inquiry here.

12 “A civil action may be brought in … a judicial district in which any defendant
13 resides, if all defendants are residents of the State in which the district is located....” 28
14 U.S.C. § 1391(b)(1). “For purposes of venue under this chapter, *in a State which has*
15 *more than one judicial district* and in which a defendant that is a *corporation* is subject
16 to personal jurisdiction at the time an action is commenced, *such corporation shall be*
17 *deemed to reside in any district in that State within which its contacts would be*
18 *sufficient to subject it to personal jurisdiction if that district were a separate State*, and,
19 if there is no such district, the corporation shall be deemed to reside in the district within
20 which it has the *most significant contacts*.”² 28 U.S.C. § 1391(d) (emphasis added); The
21 Rutter Group, Federal Civil Procedure Before Trial ¶ 4:230 (2023) (“Rutter Group”)
22 (“For federal *venue* purposes, … the corporation’s ‘contacts’ with the *district* are
23 determinative.”) (emphasis in original).

24 Defendant has made absolutely no attempt to demonstrate via admissible evidence
25 that if the Eastern District were “a separate State,” “its contacts would be sufficient to
26

27 ² Plaintiff’s investigation has determined that Defendant’s headquarters are located in the
28 City of San Francisco, which is located in the Northern District. (Ferrell Decl. ¶ 25 &
Exs. 6-7.) Thus, the Court should deem Defendant to reside in the Northern District.

1 subject it to personal jurisdiction.”³ 28 U.S.C. § 1391(d). That is, Defendant has made
2 no attempt to demonstrate that general personal jurisdiction can be exercised over itself
3 in the Eastern District. Indeed, Plaintiff has shown that its corporate headquarters are
4 located in the Northern District. (Ferrell Decl. ¶ 25 & Exs. 6-7.) Also, Defendant has
5 made no attempt to show that specific personal jurisdiction exists over Defendant *in the*
6 *Eastern District based on Plaintiff’s claims.*

7 Defendant’s reliance upon *Carrera v. First American Home Buyers Protection Co.*,
8 2012 WL 13012698, at *5 (C.D. Cal. Jan. 24, 2012), is misplaced because *Carrera* failed
9 to address the venue requirements of 28 U.S.C. § 1391(d). *Carrera* addressed § 1391(c)
10 only. 2012 WL 13012698, at *5.

11 **3. Defendant’s Consent to Suit in the Eastern District Is Irrelevant.**

12 Defendant’s consent to suit in the Eastern District is irrelevant. “Under 28 U.S.C.
13 § 1404(a), a court can only transfer an action to the venue where it ‘might have been
14 brought,’ *not ‘where it may now be rebrought, with defendants’ consent.’*” *Sedaker*
15 *Group of Southern California Inc. v. DirectBuy Inc.*, 2015 WL 13919071, at *2 (C.D.
16 Cal. May 15, 2015) (emphasis added) (citation omitted); *Hoffman v. Blaski*, 363 U.S. 335,
17 342-43 (1960).

18 Thus, because Defendant has failed to satisfy the threshold requirement that it show
19 that Plaintiff could have filed her suit in the Eastern District, the Court need not address
20 the remaining interest of justice and convenience factors.

21 **C. The Interests of Justice Do Not Favor a Transfer.**

22 **1. Plaintiff’s Choice of Venue Should Be Given at Least Some Weight**

23 **Even If Such Weight Is Diminished by Filing a Putative Class Action.**

24 “Ordinarily, where relevant factors do not strongly favor transfer, ‘the plaintiff’s
25 choice of forum should rarely be disturbed.’” *Lodestar*, 2017 WL 1434265, at *4

26 ³ The Court should disregard any attempt to introduce extrinsic evidence via Defendant’s
27 reply as untimely because it should have been submitted with its initial Memorandum.
“A district court may refuse to consider new evidence submitted for the first time in a
28 reply if the evidence should have been presented with the opening brief.” *Wallace v. Countrywide Home Loans, Inc.*, 2009 WL 4349534, at *7 (C.D. Cal. Nov. 23, 2009).

1 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)). “There is a strong
2 presumption in favor of Plaintiffs’ choice of forum.” *Viva Healthcare Packaging, Ltd. v.*
3 *CTL Packaging USA, Inc.*, 2013 WL 12142564, at *2 (C.D. Cal. Oct. 8, 2013) (citing
4 *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986)).
5 “However, deference to the plaintiff’s choice of venue [is] diminished if the moving party
6 establishes one or more of the following factors:

7 (1) the operative facts have not occurred within the forum; (2) the forum has no
8 particular interest in the parties or subject matter; (3) the forum is not the primary
9 residence of either the plaintiff or defendant; or (4) the subject matter of the
10 litigation is not substantially connected to the forum.”

11 *Lodestar*, 2017 WL 1434265, at *4 (quoting *Metz*, 674 F. Supp. 2d at 1146).

12 Notably, in stark contrast, the operative facts have occurred within the forum venue
13 of the Central District, and the Court does have a significant connection to the activities
14 alleged in the Complaint because Plaintiff, a California resident, (Byars Decl. ¶ 2), has
15 visited Defendant’s Website and used its Website while located in the Central District,
16 (Byars Decl. ¶¶ 2-3).

17 Although Defendant argues that Plaintiff’s choice of venue should be ignored
18 entirely because she has pled her action as a putative class action, (Def.’s Mem. at 6:16-
19 19), even if the weight of Plaintiff’s choice of venue is diminished to a certain degree
20 under Ninth Circuit authority because of the manner in which Plaintiff has pled the instant
21 putative class action, Plaintiff’s choice should still be given *some* weight because of
22 Plaintiff’s residency within the Central District and the fact that the material events that
23 triggered Plaintiff’s filing of the instant action occurred in the Central District.

24 *Schoonover v. Iovate Health Sciences U.S.A. Inc.*, 2020 WL 5015269, at *3 (C.D. Cal.
25 June 18, 2020) (“[A]lthough Plaintiff’s choice of forum is given *somewhat less weight*
26 since she does not reside here and is representing a class, *it is nevertheless entitled to*
27 *some weight* because she purchased the product here.”) (emphasis added). Thus,

1 Defendant's argument that Plaintiff's choice of venue should be ignored as completely
2 irrelevant is mistaken.

3 **2. Plaintiff Did Not Engage in Forum Shopping.**

4 Defendant's forum shopping and "gamesmanship" accusations, (Def.'s Mem. at
5 6:22-9:13), are without merit for multiple reasons addressed below.

6 **a. Plaintiff Sued in Her Home District, Which Has Substantial Ties
7 to the Controversy.**

8 Plaintiff is a resident of the Central District, and her chat communications occurred
9 while she was located in such District. (Byars Decl. ¶¶ 2-3.) Defendant's argument that
10 Plaintiff engaged in forum shopping by selecting her home District in which to sue
11 ignores case authority cited by Defendant explaining that "concerns of forum-shopping
12 are potentially present when *a plaintiff pursues litigation outside his home district.*"
13 *Mitchell v. Deutsche Bank Nat'l Trust Co.*, 2015 WL 12867746, at *3 (C.D. Cal. Oct. 29,
14 2015) (emphasis added); *Wireless Consumers Alliance, Inc. v. T-Mobile USA, Inc.*, 2003
15 WL 22387598, at *5 (N.D. Cal. Oct. 14, 2003) (noting that "the transfer statute has a
16 built-in mechanism to remedy the evils of forum shopping by giving little or no weight
17 to *the plaintiff's choice of forum away from home and without ties to the controversy*")
18 (emphasis added). Thus, forum shopping should not be inferred if the plaintiff's choice
19 of forum is her home District and the chosen forum has substantial ties to the controversy
20 as is the case here. "It typically does not constitute forum shopping where a party 'acted
21 within his rights in filing a suit in the forum of his choice,' even where '[t]he chronology
22 of events suggests that both parties took a somewhat opportunistic approach to th[e]
23 litigation[.]" *Seneca Ins. Co., Inc. v. Strange Land, Inc.*, 862 F.3d 835, 846 (9th Cir.
24 2017) (internal citation omitted).

25 Defendant's reliance on *Vital Pharmaceuticals, Inc. v. Monster Energy Co.*, 2020
26 WL 6162796 (C.D. Cal. Aug. 27, 2020), is misplaced because the Court found forum
27 shopping to exist because "Plaintiff filed this matter in *a forum thousands of miles away*
28 *from its home district* and after unfavorable rulings from that district." *Id.* at *3

1 (emphasis added). Notably, those “unfavorable rulings” were against the plaintiff in its
2 first filed action in the Southern District of Florida. *Id.*

3 **b. Plaintiff Filed the Instant Action After Plaintiff’s Counsel
4 Realized that Her Substantive Action Was More Likely to
5 Prevail Than Martin’s Then-Pending Action.**

6 Defendant’s forum shopping accusations are without merit. In reality, Plaintiff
7 filed the instant action after Plaintiff’s counsel, who is also the counsel for Martin in the
8 *Martin* action, realized that Plaintiff’s action was more likely to prevail on the merits than
9 Martin’s then-pending action in light of Defendant’s consent defense asserted by
10 Defendant in *Martin*. (Ferrell Decl. ¶¶ 16-19.) “[C]lass certification is inappropriate
11 where a putative class representative is subject to unique defenses which threaten to
12 become the focus of the litigation.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508
13 (9th Cir. 1992). Defendant represented to the court in the *Martin* action that it had
14 installed a warning notice on its chat feature on its Website before Martin used it in late
15 October 2022.⁴ (RJN Ex. 1 at 10:8-11.) If Defendant’s representation to the *Martin* court
16 was true, then Plaintiff’s action is surely much stronger as to such defense because
17 Plaintiff used the Website in August 2022. (Byars Decl. ¶ 2.)

18 **c. Multiple Unfavorable Decisions Were Issued in the Central
19 District Before Plaintiff Commenced the Instant Action.**

20 Defendant’s implicit assumption that Plaintiff filed her action in the Central
21 District because it was viewed as a favorable forum is without merit. As Defendant is
22 well aware, multiple other judges in the Central District have issued various unfavorable
23 rulings on dispositive motions involving similar CIPA claims *before* the instant action
24 was filed. *See, e.g., Byars v. Sterling Jewelers, Inc.*, 2023 WL 2996686, at *2-*4 (C.D.
25 Cal. Apr. 5, 2023) (dismissing action for lack of Article III standing to sue), *Byars v.*
26 *Sterling Jewelers, Inc.*, 2023 WL 4195768 (C.D. Cal. May 18, 2023) (denying motion for

27 ⁴ As mentioned above, Defendant’s representation to Plaintiff’s counsel that it installed
28 such warning notice on June 6, 2022, (Ferrell Decl. ¶¶ 10, 14), is false, (Ferrell Decl. ¶ 2
& Ex. 1).

1 reconsideration); *Licea v. Cinmar, LLC*, 2023 WL 2415592, at *4-*13 (C.D. Cal. Mar.
2 7, 2023) (dismissing section 631(a) claim with leave to amend, and dismissing section
3 632.7 claim without leave to amend); *Licea v. American Eagle Outfitters, Inc.*, 2023 WL
4 2469630, at *4-*10 (C.D. Cal. Mar. 7, 2023) (dismissing section 631(a) claim with leave
5 to amend); *Byars v. Hot Topic, Inc.*, 2023 WL 2026994, at *5-*12 (C.D. Cal. Feb. 14,
6 2023) (finding lack of CAFA subject matter jurisdiction and dismissing claims under
7 sections 631(a) and 632.7); *Licea v. Caraway Home Inc.*, 2023 WL 1999496, at *6-*10
8 (C.D. Cal. Feb. 9, 2023) (finding lack of CAFA subject matter jurisdiction and lack of
9 personal jurisdiction).

10 Indeed, even several of the decisions authored by this Court have not been
11 favorable in certain important respects. *Licea v. Old Navy, LLC*, 2023 WL 3012527, at
12 *4 (C.D. Cal. Apr. 19, 2023) (dismissing section 631(a) claim for direct liability with
13 prejudice and dismissing section 631(a) for derivative liability with leave to amend);
14 *Cody v. Boscov's, Inc.*, 2023 WL 2338302, *2-*3 (C.D. Cal. Mar. 2, 2023) (dismissing
15 section 631(a) claim for direct liability with prejudice and dismissing section 631(a) for
16 derivative liability and section 632.7 claim with leave to amend).

17 Defendant conveniently ignores the foregoing unfavorable case authority because
18 it contradicts Defendant's forum shopping narrative.

19 **d. Plaintiff Did Not Engage in “Judge Shopping” by Filing the
20 Instant Action.**

21 Defendant's argument that Plaintiff and her counsel have engaged in improper
22 “judge shopping” to ensure that the instant action would be assigned to this Court is
23 simply wrong.

24 As an initial matter, Defendant expressly argues that Plaintiff violated L.R. 83-
25 1.3.1 by not disclosing the alleged circumstance that *Martin* was “pending” in Plaintiff's
26 Notice of Related Cases filed in the instant action.⁵ (Def.'s Mem. at 3:28-4:2.)

27 ⁵ Defendant's contention that Plaintiff filed the instant action before *Martin* was
28 “officially dismissed by the Eastern District,” (Def.'s Mem. at 3:20-23), is misleading

Continued on the next page

1 Defendant's reliance on L.R. 83-1.3 is, however, misplaced because its plain language
2 applies only to multiple cases pending and filed in the Central District. L.R. 83-1.3.1
3 requires parties to promptly file a Notice of Related Cases whenever "two or more civil
4 cases **filed in this District**" "would entail substantial duplication of labor if heard by
5 different judges." (L.R. 83-1.3.1) (emphasis added). Needless to say, "this District"
6 means the Central District only. Thus, L.R. 83-1.3.1 did not require that Plaintiff file a
7 Notice of Related Cases to disclose the existence of *Martin*, which, in any event, had
8 already been voluntarily dismissed without prejudice by Martin by the time that the
9 Notice of Related Cases was filed in the instant action. Thus, Plaintiff filed its Notice of
10 Related Cases in the instant action appropriately. Defendant's argument to the contrary
11 is baseless.

12 In addition, it was appropriate for Plaintiff to file a Notice of Related Cases in light
13 of this Court's assignment to *Byars v. The Goodyear Tire and Rubber Co.*, No. 5:22-cv-
14 01358-SSS-KK (C.D. Cal. filed Aug. 1, 2022), which was the first-filed action in any
15 CIPA case involving Plaintiff as a party. "The Court's 'low-number transfer' procedure
16 reassigns related cases to the docket of the judge with the lowest-numbered case without
17 regard to the division in which the later-filed (or ... the later-removed) cases would
18 otherwise be assigned." *Alpha Floors, Inc. v. Dyno Exchange*, 2016 WL 11495985, at
19 *2 (C.D. Cal. Dec. 12, 2016) (citing Gen. Order 16-05 at 20)). Given that this Court has
20 the low number case in which Plaintiff is a party, the Court's procedure for transferring
21 related cases to the judge with the low number case, and case authority reflecting the

22 because it implies that the *Martin* court was required to effectuate the dismissal of that
23 action via a court order, **which expressly contradicts its order stating that "no court
order is required"**. (RJN Ex. 8 at 1:26-28) (emphasis added).

24 Defendant can't have it both ways. Although Defendant has concurrently
25 challenged the propriety of Plaintiff filing a Notice of Related Cases under L.R. 83-1.3.1
26 in the instant action, (Def.'s Mem. at 12:9-14:14), Defendant has also accused Plaintiff
27 of violating L.R. 83-1.3.1 by not disclosing the existence of *Martin* despite its voluntary
dismissal before such Notice of Related Cases was filed, (Def.'s Mem. at 3:28-4:2). One
can imagine the accusations that Defendant would have made if Plaintiff had failed to file
any Notice of Related Case in the instant action. Indeed, in *Keilholtz v. Superior
Fireplace Co.*, 2008 WL 541147 (N.D. Cal. Dec. 29, 2008), the court found judge
shopping had occurred in part based on the plaintiffs' failure to file any notice of related
cases. *Id.* at *2.

1 Court agreeing to allow a low number transfer of related cases, *see, e.g., Audionics*
2 *System, Inc. v. AAMP of Florida, Inc.*, 2013 WL 12129650, at *8 (C.D. Cal. Apr. 19,
3 2013) (“The court will accept a low number transfer”), it was entirely reasonable for
4 Plaintiff’s Notice of Related Cases to recognize the other pending actions assigned to this
5 Court ***in which Plaintiff is a party*** including the *Goodyear* action. Indeed, the fact that
6 the Court accepted the transfer, (Doc. 10), confirms that such Notice was reasonable at
7 the time it was filed (even if the Court now disagrees with the judicial efficiency of such
8 transfer).

9 Moreover, there was never any reasonable assurance that a case filed by Plaintiff
10 in the Central District would necessarily be assigned to this Court (including via
11 reassignment). As noted by Defendant, other judges in the Central District have declined
12 to transfer their CIPA cases filed by clients of Plaintiff’s counsel’s law firm to this Court
13 even after the filing of a notice of related cases. (Def.’s Mem. at 13:15-17.) And, this
14 Court has recently declined to consent to the transfer of multiple cases because this Court
15 has determined that it “anticipates that questions of law and fact will diverge substantially
16 as the cases progress....” *See, e.g., Valenzuela v. Faherty Brand, LLC*, No. 8:23-cv-
17 01574-JVS-JDE, Doc. 9 (C.D. Cal. Aug. 31, 2023); *Cody v. Glasses USA, Inc.*, No. 8:23-
18 cv-01545-JVS-KES, Doc. 11 (C.D. Cal. Aug. 30, 2023). This Court could very well have
19 made that same determination at the outset of this action.

20 Furthermore, the recent decisions in *Garcia v. Yeti Coolers, LLC*, 2023 WL
21 5736006, at *2-*4 (C.D. Cal. Sept. 5, 2023), and *Valenzuela v. Nationwide Mutual Ins.*
22 Co., 2023 WL 5266033, at *3-*7 (C.D. Cal. Aug. 14, 2023), and other Central District
23 decisions such as *Saleh v. Nike, Inc.*, 562 F. Supp. 3d 503, 520-21 (C.D. Cal. 2021), and
24 *Yoon v. Lululemon USA, Inc.*, 549 F. Supp. 3d 1073, 1081 (C.D. Cal. 2021), demonstrate
25 that Plaintiff did not need to rely on cases assigned to this Court in order to prevail on
26 dispositive motions in CIPA cases.

27
28

1 In reality, Defendant's accusation that Plaintiff and her counsel have engaged in
2 improper judge shopping is yet another attempt to smear them in a brazen and unseemly
3 attempt to bias the Court.

4 Defendant's reliance upon *Keilholtz v. Superior Fireplace Co., supra*, is misplaced.
5 Although *Keilholtz* involved the practice of "judge-shopping," 2008 WL 541147, at *1-
6 *2, Defendant makes no attempt at all to contend that any of the circumstances at issue
7 in *Keilholtz* that resulted in a judge shopping determination by the court therein similarly
8 apply to the circumstances at issue in the instant action.

9 **e. Plaintiff Was Never a Party in the *Martin* Action So She Never
10 Received an Unfavorable Ruling.**

11 Although Defendant's forum shopping argument is predicated upon the
12 assumption that Plaintiff received an unfavorable ruling in *Martin* because *Martin* was
13 pled as a putative class action and that she was a putative class member, (Def.'s Mem. at
14 7:7-9); *id.* at 2:18-19 (warning of "inconsistent judgments"), Plaintiff was never a party
15 in *Martin*, which never certified any class.⁶ *Smith*, 564 U.S. at 315, 318. Thus,
16 Defendant's reliance on cases in which courts found forum shopping to exist in
17 circumstances in which a plaintiff filed cases in two different judicial Districts, *Vital*
18 *Pharmaceuticals, Inc. v. Monster Energy Co.*, 2020 WL 6162796, at *3 (C.D. Cal. Aug.
19 27, 2020); *LegalForce, Inc. v. Legalzoom.com, Inc.*, 2018 WL 6179319, at *4 (C.D. Cal.
20 Nov. 27, 2018); *Banga v. First USA, NA*, 2010 WL 727749, at *2 (E.D. Cal. Mar. 2, 2010)
21 (individual plaintiff who voluntarily dismissed party from Northern District action and
22 filed Eastern District case against that same party after her litigation against that party in
23 Northern District failed); *Alexander v. Franklin Resources, Inc.*, 2007 WL 518859, at *4
24 (N.D. Cal. Feb. 14, 2007), is misplaced because those cases are factually distinguishable.

25 **f. *Meza v. Procter & Gamble Co.* and Similar Non-Binding District
26 Court Decisions Contradict Ninth Circuit Precedent.**

27
28 ⁶ L.R. 83-1.2.1 cannot apply because Plaintiff was not a party in *Martin*.

1 Defendant's reliance on *Meza v. Procter & Gamble Co.*, 2023 WL 3267861, at *4
2 (C.D. Cal. Apr. 27, 2023) ("It matters little whether the same named plaintiff is involved
3 in the same or similar actions, for there is an equally strong inference of forum shopping
4 when the parallel actions are filed by the same law firm, and such strategic machinations
5 by plaintiff's counsel are equally discouraged under Section 1404(a)."), is misplaced for
6 several reasons. First, *Meza* has failed to cite any Supreme Court or Ninth Circuit
7 decision supporting its application of forum shopping to non-parties in a parallel action.

8 Second, *Meza* failed to address *Smith*, which expressly considered, but rejected
9 relitigation concerns associated with putative class actions that are not certified. *Smith*,
10 564 U.S. at 316-18. Notably, the Supreme Court expressly rejected the corporate
11 defendant's argument warning that *Smith*'s holding would allow "class counsel [to]
12 repeatedly try to certify the same class 'by the simple expedient of changing the named
13 plaintiff in the caption of the complaint,'" *id.* at 316, by concluding that "this form of
14 argument flies in the face of the rule against nonparty preclusion." *Id.* Also, *Smith* noted
15 "a commonplace of preclusion law—that nonparties sometimes benefit from, even
16 though they cannot be bound by, former litigation." *Smith*, 564 U.S. at 313 n.10. In
17 essence, *Meza*'s extremely broad interpretation of forum shopping might hinder the
18 ability of unnamed putative class members who happen to retain the same law firm that
19 previously sought to represent them in a putative class that was never certified for
20 whatever the reason from filing their own individual actions and maintaining such suits
21 in a convenient venue in their local home jurisdiction. *Meza* allows corporate defendants
22 to weaponize the forum shopping accusation to impede and potentially thwart such
23 individual actions from ever being filed or litigated on the merits in light of the very real
24 prospect of having to litigate in an extremely inconvenient forum perhaps thousands of
25 miles away. *Smith* did not contemplate such a punitive outcome attributable to the mere
26 happenstance of being a former putative member in an uncertified class action.

27 Third, *Meza* failed to address the Ninth Circuit's published guidance about forum
28 shopping in *R.R. Street & Co. Inc. v. Transport Ins. Co.*, 656 F.3d 966 (9th Cir. 2011),

1 holding that “we are cautious about labeling as ‘forum shopping’ a plaintiff’s desire to
2 bring ***previously unasserted claims in federal court.***” *Id.* at 982 (emphasis added),
3 *quoted in Seneca Ins. Co.*, 862 F.3d at 846. By disregarding whether or not a plaintiff’s
4 claims have been “previously unasserted” or not, *Meza*’s approach to forum shopping is
5 inconsistent with the Ninth Circuit’s guidance in *R.R. Street & Co. Inc.*, which is binding
6 precedent.

7 Fourth, *Meza*’s reliance upon both *Trottier v. Fieldcore Servs. Solutions, LLC*,
8 2020 WL 13304063, at *5 (C.D. Cal. Aug. 3, 2020), and *Williams v. WinCo Foods, LLC*,
9 2013 WL 211246, at *7-*8 (E.D. Cal. Jan. 10, 2013), is misplaced. Neither *Trottier* nor
10 *Williams* addressed or considered the Ninth Circuit’s guidance in *R.R. Street & Co. Inc.*
11 or *Smith*.

12 Fifth, *Meza*’s reliance upon *Forrand v. Federal Exp. Corp.*, 2008 WL 276389, at
13 *3 (N.D. Cal. Jan. 31, 2008), is misplaced. *Forrand* was decided before either *R.R. Street*
14 & *Co. Inc* or *Smith* was decided. Indeed, *Forrand* seems to wrongly assume that being
15 “part of the putative class” is equivalent to being a named plaintiff in a putative class
16 action, 2008 WL 276389, at *3, which contradicts *Smith*’s bright-line rule differentiating
17 between a “party” and unnamed members in a putative class that has never been certified.

18 Finally, *Meza*’s reliance on certain other cases in support of the proposition,
19 “Forum shopping could [also] reasonably be inferred if the plaintiff files the same or
20 similar case represented by the same law firm in a different district after receiving
21 unfavorable rulings there,” *Meza*, 2023 WL 3267861, at *3 (quoting *LegalForce*, 2018
22 WL 6179319, at *3), is equally unpersuasive because the case authority that *Meza* cited
23 did not consider the Ninth Circuit’s guidance in *R.R. Street & Co. Inc* nor *Smith*. In
24 addition, *Meza*’s quotation was of *LegalForce*, however, that decision involved a fact
25 pattern in which a plaintiff entity was the same party in two cases filed in two different
26 Districts. Thus, *LegalForce* did not address the question whether one can infer forum
27 shopping when a different plaintiff files a case in the plaintiff’s home District and such
28 case has substantial ties to the home District.

1 Although *LegalForce*, in turn, cited *Carrera*, *Carrera* is factually distinguishable
2 because the plaintiff therein was a resident of Virginia whose chosen venue (*i.e.*, Los
3 Angeles County) was not located within her home District. 2012 WL 13012698, at *6.
4 Similarly, *Carrera* made no finding regarding whether the plaintiff's chosen venue had
5 ties to her controversy.

6 Also, the sole decision cited in *Carrera* was *Alexander v. Franklin Resources, Inc.*,
7 2007 WL 518859, at *4 (N.D. Cal. Feb. 14, 2007). *Carrera*, 2012 WL 13012698, at *6.
8 *Alexander* involved a fact pattern in which the same plaintiff filed suit in two different
9 forums. *Alexander*, 2007 WL 518859, at *4 (“*the same plaintiff* represented by the same
10 law firm filed a similar lawsuit in New Jersey, and after receiving unfavorable rulings
11 from that court, filed the instant case”) (emphasis added). Notably, *Alexander* cited no
12 case authority in support of its proposition. In other words, *Meza*'s analysis of forum
13 shopping is predicated upon a line of case authority originating from the *Alexander*
14 decision, which involved the same plaintiff filing suit in two different forums. *Alexander*
15 did not have an opportunity to consider the Ninth Circuit's subsequent guidance in *R.R.*
16 *Street & Co. Inc or Smith*.

17 **g. The Instant Motion Is an Attempt at Judge Shopping.**

18 Defendant ignores that the instant Motion, which either seeks a transfer to the
19 Eastern District so that it can be assigned to Magistrate Judge Boone and District Judge
20 Thurston, (Def.'s Mem. at 9:21-23), or a transfer back to Judge Bernal of the Central
21 District, (Def.'s Mem. at 2:28; 14:13), itself is an attempt at judge shopping. *Shields v.*
22 *Amerigas Propane, Inc.*, 2015 WL 5436772, at *4 (E.D. Cal. Sept. 15, 2015) (“defendant
23 also has reasons to reverse-forum shop and be heard before a judge that has once ruled in
24 its favor””). Thus, assuming *arguendo* that the Court finds that Plaintiff engaged in forum
25 shopping, the interest of justice does not favor a transfer because Defendant is attempting
26 to engage in the judge shopping that it accuses Plaintiff of engaging in. *Tittl v. Hilton*
27 *Worldwide, Inc.*, 2013 WL 1087730, at *8 (E.D. Cal. Mar. 14, 2013) (“in light of what
28 the Court finds is an attempt at judge shopping—likely by both parties—this factor is

1 neutral"); *Smith v. Lenchs*, 263 F.3d 972, 978 (9th Cir. 2001) ("If there is any forum
2 shopping to be considered here, it cannot be said that one side is at fault more than the
3 other, for neither can be faulted for seeking to litigate issues in the forum of its choice.").

4 **3. Other Interest of Justice Factors Favor Plaintiff.**

5 The Eastern District is much more congested than the Central District on two key
6 metrics (filing to disposition and filing to trial). (RJN Ex. 10.)

7 As for the parties' contacts with the forum and the place where the operative facts
8 allegedly occurred, a Central District forum is justified by both Plaintiff's contacts and
9 with Defendant's California contacts operating numerous stores within the Central
10 District. (Byars Decl. ¶¶ 2-3; Ferrell Decl. ¶ 26 & Ex. 8.) As such, Defendant surely
11 anticipated being haled into the Central District forum because it is deliberately doing
12 business within the lucrative Central District consumer marketplace, which represents
13 approximately 48.9 percent of California's population. (RJN Exs. 11-12.)

14 An analysis of whether this Court or the Eastern District has a compelling local
15 interest in the controversy indicates that this factor favors Plaintiff. If the putative class
16 is not certified resulting in the case remaining an individual action, then this Court has a
17 compelling local interest in the controversy unlike the Eastern District.

18 **4. Other Interest of Justice Factors Are Neutral.**

19 Given that the governing law is California law, such factor is neutral.

20 As for the expenditure of resources, Defendant is exaggerating the costs of having
21 to travel to the Central District for its Northern District-based witnesses. Surely,
22 Defendant's witnesses can appear remotely for deposition under Fed. R. Civ. P. 30(b)(4).
23 *Schoonover*, 2020 WL 7094061, at *1-*3. Indeed, the COVID-19 pandemic caused
24 remote depositions to be widely used. *Id.*

25 As for the ease of access to sources of proof, this factor is neutral because this is
26 not a document-intensive case. And, many documents can be transferred electronically.
27 "If transfer is sought based on the location of records and documents, the movant must
28 show with particularity the location, difficulty of transportation, and the importance of

1 such records.” *Viva Healthcare Packaging, Ltd.*, 2013 WL 12142564, at *3 (“because
2 many documents can be transferred electronically, this factor is not always accorded
3 significant weight). **Defendant has made no such showing at all.**

4 **D. The Convenience Factors Favor Plaintiff.**

5 **1. The Convenience of the Parties Strongly Favors Plaintiff’s Choice of
6 Venue.**

7 Defendant’s analysis regarding the convenience of the parties completely ignores
8 the inconvenience to Plaintiff if the case is transferred to the Eastern District given that
9 Plaintiff is a California resident who resides within the Central District. (Byars Decl. ¶¶
10 2, 4.)

11 As for Defendant’s convenience, Defendant has not even attempted to make any
12 evidentiary showing via any sworn declaration. “[A] court will not order a transfer simply
13 to make it more convenient for defendant[.]” Rutter Group, *supra*, ¶ 4:732. Yet, that is
14 precisely what Defendant asks the Court to do by citing its own convenience as a basis
15 for the instant Motion.

16 **2. The Convenience of the Witnesses Factor, Which Is the Most
17 Important Factor, Is Neutral Because Defendant Has Made No
18 Evidentiary Showing As to the Convenience of the Non-Party
19 Witnesses.**

20 “The relative convenience to the witnesses is often recognized as the most
21 important factor to be considered in ruling on a motion under § 1404(a). Importantly,
22 [w]hile the convenience of party witnesses is a factor to be considered, ***the convenience
23 of non-party witnesses is the more important factor.***” *Lodestar Anstalt*, 2017 WL
24 1434265, at *3 (emphasis added); *Viva Healthcare Packaging, Ltd.*, 2013 WL 12142564,
25 at *4 (“convenience to non-party witnesses warrants greater weight than convenience to
26 party witnesses”). “Non-party witnesses may not be subject to the Court’s subpoena
27 power, like party witnesses such as employees, which is why courts give more weight to
28

1 their convenience.” *WP Banquet, LLC v. Target Corp.*, 2016 WL 9450448, at *10 (C.D.
2 Cal. Dec. 15, 2016) (citation omitted).

3 “To establish that convenience of the witnesses favors transfer, ***a party must***
4 ***identify the witnesses it plans to call, the anticipated areas of their testimony and its***
5 ***relevance***, and the reasons why the present forum would present a hardship to their
6 appearance.” *Viva Healthcare Packaging, Ltd.*, 2013 WL 12142564, at *3 (emphasis
7 added). “This factor is designed to determine the forum in which the parties will be able
8 to compel the ***key*** witnesses to testify.” *Id.* (emphasis added).

9 Defendant has failed to identify even a single likely trial witness who is also an
10 employee of Defendant, nor such employee’s anticipated areas of testimony and the
11 relevance of such testimony.

12 Although Defendant contends that “most witnesses at trial will be experts, who do
13 not reside within the Central District,” (Def.’s Mem. at 10:12-13), Defendant has failed
14 to identify any such likely non-party witnesses via a sworn declaration.

15 **3. Because a Transfer Here Would Merely Shift the Inconvenience From
16 One Party to Another, the Instant Motion Should Be Denied.**

17 In *Schoonover*, *supra*, the Court denied a similar motion to transfer after
18 concluding:

19 “Considering all of the factors, Defendant has not met its burden to show
20 that transfer would do anything but “shift the inconvenience from one party to
21 another,” so the Court defers to Plaintiff’s choice of venue, which in fact bears a
22 meaningful connection to her claims.”

23 *Schoonover*, 2020 WL 5015269, at *3. *Schoonover* is directly on point. Here, a transfer
24 would merely “shift the inconvenience from one party to another,” which is not a sound
25 basis for the Court to exercise its discretion by transferring this case to the Eastern
26 District.

27
28

1 Dated: September 8, 2023

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3 Scott. J. Ferrell
Attorneys for Plaintiff

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Plaintiff, certifies that this brief contains 6,997 words, which complies with the word limit of L.R. 11-6.1.

Dated: September 8, 2023

/s/ Scott J. Ferrell

Scott J. Ferrell